UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

STATE OF MAINE, and PAUL MERCER, in his official capacity as Commissioner of the Maine Department of Environmental Protection, Plaintiffs, v. ANDREW WHEELER, Acting Administrator, United States Environmental Protection Agency, *et al.* Defendants and PENOBSCOT NATION and HOULTON BAND OF MALISEET INDIANS, Defendants-Intervenors.	Civil Action No. 1:14-cv-264 JDL

OPPOSITION OF THE PENOBSCOT NATION TO EPA'S MOTION FOR VOLUNTARY REMAND

Intervenor, the Penobscot Nation (the "Nation"), opposes in full EPA's Motion for Voluntary Remand. If a remand of any EPA decision is granted, the Nation agrees with EPA that it must be without vacatur of the existing decisions. ECF 139, ¶8. Indeed, this Court lacks the discretion to grant the vacatur of only a portion of EPA's February 2, 2015 decision as requested by Maine in its Limited Opposition, ECF 151. In addition, the Nation agrees with Maine that the Court should retain jurisdiction over EPA's actions during any remand, ECF 151, PageID#3963.

I. EPA Should Be Denied a Voluntary Remand of Decisions That It has Already Reconsidered and Reaffirmed Once During the Pendency of This Litigation

Maine initially sued EPA in July 2014 for failure to timely approve or disapprove its surface water quality standards ("WQS"). ECF 1, 7. Its lawsuit was rendered moot in early 2015, however, when EPA issued its decision determining that the Maine Indian Claims Settlement Act

and the Maine Implementing Act provided Maine jurisdictional authority to propose WQS in Indian Waters,[1] and to formally approve the bulk of Maine's standards, but to disapprove those it found insufficiently protective of tribal sustenance fishing rights in tribal waters. *See* ECF 22, 26. EPA explained that its jurisdictional determination was intricately intertwined with the portions of its decisions here challenged by Maine:

> EPA analyzed the jurisdictional provision of MICSA extensively .... EPA concludes that under the unique jurisdictional formula Congress established in Maine, the State has jurisdiction to set WQS in the waters on the Tribes' lands. ... But the Agency also finds that this authority is not unconstrained. ... EPA is informed by the operation of the Indian settlement acts in Maine and will require that WQS in tribal waters protect the Tribes' sustenance fishing use of those waters.

EPA's Administrative Record ("Record") at 5304, which refers to individual numbered pages of the Record as submitted by EPA, along with an index, on compact disc. ECF 37-38. Rather than revise its WQS to protect those rights in accord with EPA's decision, Maine instead amended its complaint to challenge a portion of EPA's February 2, 2015 decisions. ECF 30. The Court subsequently dismissed Count III, leaving Count I (an APA Claim) and Count II (a Declaratory Judgment Claim).

In the interim, because Maine failed to correct its WQS, EPA promulgated federal replacement WQS as required by the Clean Water Act ("CWA") to protect tribal sustenance fishing rights. *See* ECF 62. Public comments overwhelmingly supported EPA's proposed WQS, 81 Fed. Reg. at 92,475. EPA published the final rule in the Federal Register on December 19, 2016, and it became effective on January 18, 2017. 81 Fed. Reg. 92,466 (Dec. 19, 2016); ECF 62. Maine has not challenged that final rule, although it has represented that it "still intends to eventually challenge

[1] Other states have no such authority or jurisdiction, which would instead lay with EPA or a tribe that had received treatment as a state. See 40 CFR §§ 131.4-131.5; Record (ECF 37-38) at 5316-17 (*citing Alaska v. Native Vill. Of Venetie Tribal Gov't,* 522 U.S. 520, 527 n.1 (1998)).

or request that EPA amend it." ECF 15, PageID# 3960. Maine has already once asked EPA to amend it.

In the wake of Donald Trump's inauguration, Maine embarked on efforts to undo the work of EPA in protecting the water quality of the Penobscot Nation's sustenance fishery and that of other Maine tribes. In February 2017, it petitioned then EPA Administrator Scott Pruitt to reverse course, ECF 93-1, leading to a seven month stay of this case between May and December, 2017, *see* ECF 103 PageID# 3514; ECF 109. As part of EPA's reconsideration, the Nation submitted extensive comments and related material to EPA about the Penobscots' dependence upon fishing in their namesake river for their subsistence and cultural survival; Congress's promise to the Nation, at the time of the Settlement Acts, that those uses would be secure; and the federal government's long-exercised trust responsibility to protect those uses. *See* Exhibits 1 and 2 attached to Exhibit A (Declaration of Kaighn Smith Jr). Maine's effort proved unsuccessful. "After careful consideration," EPA reported to this Court on December 8, 2017, the agency decided "not to withdraw or otherwise change any of the decisions that are challenged in this case." ECF 103, PageID#3526.

In January 2018, the Court issued a Scheduling Order for the parties to brief the merits. ECF 117. In accord with that order, Maine filed its opening merits brief on February 16, 2018, in which Maine refers to EPA's February 2, 2015 decisions using the defined term "EPA's Action." ECF 118, PageID #3561. ECF 118. After requesting and obtaining a one-week extension, EPA's brief was due on June 28, 2018. On June 26, however, Maine and EPA filed a joint motion for a 30-day stay, representing that they were engaged in working on a settlement; albeit, one that excluded substantive participation by intervenors, the Penobscot Nation and the Houlton Band of Maliseet Indians. *See* ECF 132; ECF 136 at PageID# 3710. In a telephone conference held on

June 27, 2018, EPA Regional Administrator, Alexandra Dunn, told Penobscot Nation representatives, including Penobscot Nation Chief Francis that the EPA was "prepared to file [its brief] tomorrow" to "fully defend" EPA's decisions, but that EPA and Maine wanted to stay the case for 30 days to explore a framework for settlement. ECF 142-7 ¶2. In a telephone conference held on July 27, 2018, EPA officials announced to Penobscot representatives that EPA would file a motion to voluntarily remand its decisions in order to reconsider them, but declined to provide any reason for the reconsideration. *Id.* ¶¶3-4. When Penobscot representatives asked if the U.S. Department of the Interior ("DOI") had been consulted about EPA's reversed course, they were told that EPA had not consulted with DOI, other than in reference to an earlier supplemental opinion that was filed as ECF 129-1 in this case. *Id.* ¶5.[2] EPA now requests a remand of its February 2, 2015 decisions, without vacatur and without admitting legal error, relying on its "inherent authority to reconsider past decisions." ECF 139 ¶5.

II. The Court Should Deny In Full EPA's Request For A Voluntary Remand Because EPA has Not Demonstrated a "Substantial and Legitimate Concern" to Justify the Remand, and Because The Issues Here in Dispute Involve a Question—the Scope of the EPA's Statutory Authority—That is Intertwined With Any Exercise of Agency Discretion Going Forward

EPA relies on its "inherent authority" to reconsider past decisions, but gives no reason for so doing here, other than that "EPA has new officials in place, it has reassessed the wisdom of the policies reflected in its February 2015 decision, and it has determined to materially revise" them. ECF 139, ¶5.[3] The issues decided in its February 2015 decisions, however, are not issues of

[2] In that supplemental opinion, DOI reaffirmed its prior formal opinion with respect to the sustenance fishing rights of the Penobscot Nation, writing to EPA "that to be rendered meaningful" the Penobscot Nation's reservation sustenance fishing rights "by necessity" include "subsidiary rights to water quality." ECF 129-1 at PageID# 3686.

[3] As noted above in note 2, and further explained in the text below, EPA's separate assertion that remand is warranted because DOI changed its position is of no moment with respect to Penobscot Nation reservation waters.

"policy." Instead, they are legal interpretations regarding the mandatory protection of tribal sustenance uses in Indian waters, which are constrained by statute and federal law and not subject to the policy whims of EPA. These circumstances distinguish EPA's request here from the circumstances where voluntary remands to the agency have generally been granted.

Courts have generally found voluntary remand to be appropriate "(i) when new evidence becomes available after an agency's original decision was rendered, or (ii) where 'intervening events outside of the agency's control' may affect the validity of an agency's actions." *Carpenters Indus. Council v. Salazar*, 734 F.Supp.2d 126, 132 (D.D.C.2010) (citation omitted) (quoting *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1028 (Fed.Cir.2001)). The Court has discretion to decide whether or not to remand to the agency in the absence of an intervening event if the agency has developed doubts about the correctness of its decision or that decision's relationship to the agency's other policies. *See Southwestern Bell Tel. Co. v. Fed. Communications Comm'n*, 10 F.3d 892, 896 (D.C.Cir.1993). Recent scholarship and case law has called into question whether voluntary remands should be so freely granted in situations where, as here, the agency has not admitted legal error and petitioners, intervenors, and the agency have differing positions on how the governing statutes constrain the agency's discretion. *Util. Solid Waste Activities Grp. v. Envtl. Prot. Agency*, 901 F.3d 414, 436-37 (D.C. Cir. 2018); Joshua Revesz, *Voluntary Remands: A Critical Reassessment*, Admin. L. Rev., Vol. 70, No.2, 2018 *available on SSRN* (hereafter "Revesz"); *Bayshore Cmty. Hosp. v. Azar*, No. 16-CV-02353 (APM), 2018 WL 4266083, at *3 (D.D.C. Sept. 6, 2018) (requiring the agency to articulate "substantial and legitimate concerns" that warrant a remand).[4]

[4] Courts have always refused a remand where "the agency's request is frivolous or in bad faith." *SKF*, 254 F.3d at 1029. *See, e.g., Lutheran Church–Missouri Synod v. FCC*, 141 F.3d 344, 348–49 (D.C. Cir. 1998) (finding bad faith where the agency sought remand based on a new "policy

Courts have required agencies to provide a "substantial and legitimate reason" explaining why remand is necessary. *SKF*, 254 F.3d at 1029; *Bayshore Cmty. Hosp.*, No. 16-CV-02353 (APM), 2018 WL 4266083, at *1,3 (initially denying the request for a voluntary remand where (1) Defendant had not offered a "substantial and legitimate" reason; (2) a remand would prejudice other parties by causing extensive delay; and (3) remand would be futile, as the statute constrains the agency's discretion, and subsequently reconsidering when the agency later demonstrated a substantial and legitimate reason that would not be futile); *Util. Solid Waste Activities Grp*, 901 F.3d at 436-37 (taking into account the competing positions of various Intervenors that were defending or challenging competing portions of the agency's decisions, and refusing to remand an issue that "involves a question—the scope of the EPA's statutory authority—that is intertwined with any exercise of agency discretion going forward," while granting a remand without vacatur of other portions not in dispute by the Intervenors but affected by subsequent legislation).

As recent commentators have noted, "a court should not ordinarily grant a voluntary remand when the request appears motivated by politics—if it does, it merely postpones judicial review on an agency policy shift that it will probably find unlawful in the end." *See* Revesz, Admin. L. Rev., Vol. 70, No.2 at 23 (referring to the arbitrary and capricious "hard look" review standard set forth in *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 32 (1983) that applies to policy changes based on ideological reasons).

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statement" that did not confess error and was nonbinding, where the agency could not promise any particular decision on remand, and where the court determined that the agency was merely employing "novel" tactics to evade judicial review); *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004) ("[A]n agency's reconsideration of its own decision may in some contexts be unwarranted, or even abusive"); *Corus Staal BV v. Dep't of Commerce*, 259 F. Supp. 2d 1253, 1257 (Ct. Int'l Trade 2003) (The agency's "brief does not provide any reason, policy or otherwise, . . . [it] merely requests remand so that it can 'reconsider its decision.' This is insufficient to support a voluntary remand."); *Guam Pres. Trust v. Gregory*, No. 10-677, 2011 U.S. Dist. LEXIS 101537, at *18 (D. Haw. June 30, 2011).

In this case, EPA stayed litigation for *almost eight months* after President Trump was elected and then announced on December 17, 2017 that "after careful consideration" the agency had decided against reconsidering its position. In its Motion for a Voluntary Remand filed on July 27, 2018, EPA provided two vague and unsatisfactory reasons for reversing course: (1) the fact that EPA has a new Acting Administrator, a new Assistant Administrator for Water, and a new Regional Administrator for EPA Region I (New England); and (2) the receipt of a letter from DOI on April 27, 2018 that actually *reaffirmed* that the sustenance fishing rights guaranteed by federal law for the Penobscot Nation include a water quality component. *See supra* note 2. The agency's motion does not attempt to cloak the fact that the decision to reconsider its position is entirely politically motivated.[5]

From the time that it reconsidered and reaffirmed its decisions on December 17, 2017 up until July 27, 2018, EPA made every indication that it would uphold its decision and defend its position in this Court. All three political appointees listed in EPA's motion held positions in the agency months before the sudden reversal in position. No new facts or evidence relevant to EPA's policies and legal interpretations came to light during those eight months. None of EPA's personnel changes has any impact on the sustenance fishing uses of Maine tribes in Indian waters, or their protections under federal law. The central issue here is the scope of EPA's statutory

[5] Even if new political appointments were a proper basis for EPA's reversal, the timing of the political appointments referenced in the Motion do not support EPA's request for voluntary remand this far into litigation. Alexandra Dunn filled her post on November 16, 2017, well before EPA determined that it would not change its position. https://www.epa.gov/newsreleases/epa-announces-appointment-alexandra-dunn-region-1-administrator Similarly, On October 5, 2017, Andrew Wheeler had already been nominated to become the Deputy Administrator of the EPA, was approved by the Senate on April 12, 2018 and subsequently appointed Acting Administrator on July 5, 2018. https://www.epa.gov/aboutepa/epas-acting-administrator The Assistant Administrator for Water, Dave Ross, joined EPA in January 2018, which was six months before EPA requested voluntary remand in this case. https://www.epa.gov/aboutepa/about-assistant-administrator-epas-office-water

authority (indeed, federal trust obligation) to require Maine to recognize and protect tribal sustenance uses as designated uses of tribal waters under two federal statutes: the Maine Indian Claims Settlement Acts and the Clean Water Act. Those statutes, and the trust responsibility they create for EPA, emphatically do not make protection of tribal sustenance uses an issue of policy that EPA has the discretion to change, but rather *restrict* EPA's discretion to do otherwise. Record at 5304, 5315 ("EPA has concluded that *the settlement acts operate to require* Maine and *the Agency* to focus on the sustenance fishing use that federal and state law provide for the Tribes in Maine in waters in Indian lands.") (emphasis added); *accord* ECF 129-1 (DOI supplemental opinion). Federal protection of tribal sustenance uses is not a policy preference of EPA that it can change based on the whims of new personnel. *Id.* Against this background, a voluntary remand to the agency based on an asserted change in policy preference and absent any recognized legal error in the position twice affirmed by the agency, is entirely inappropriate.

III. If This Court Does Remand Any EPA Decision, It Lacks Discretion To Vacate the February 2015 Decision, And Maine's Analysis To the Contrary is in Error

It should be noted at the outset that Maine has requested that any remand be with vacatur, but the procedural posture of this case, resulting from Maine's challenge to some *but not all* of the myriad EPA decisions dealing with water quality standards, precludes such selective vacatur. Maine has challenged only EPA's February 2, 2015 Decision, *and only a portion of it*. So, for example, Maine challenges EPA's conclusion that the sustenance fishing rights created by the Settlement Acts must be protected as designated uses, but not EPA's conclusion that the Settlement Acts give Maine jurisdiction that no other state in the nation has within Indian territory. But, as explained above, supra at 2, those portions of the Settlement Acts are not severable, and neither is EPA's analysis of them. Read plainly, and as found here by EPA, the Settlement Acts do not provide Maine with jurisdiction to set WQS that fail to recognize the Nation's sustenance fishing

rights as a designated use of the Nation's reservation waters. Thus, if the Court were to vacate the February 2, 2015 decision at issue here, it would necessarily vacate the determination that Maine has jurisdiction in Indian territory in the first instance. The Court cannot use the broad tool of vacatur as a scalpel to carve out certain sentences, but not others, from EPA's February 2015 analysis. To do otherwise would not be vacatur of the agency's decision, but would instead be judicial reformation of that decision, something that is plainly not within the Court's authority.

As some Courts have noted, granting vacatur over the objection of an intervenor effectively sets aside an agency decision without a reasoned decision by the agency, compliance with the requirements of the APA, or judicial consideration of the merits, and accordingly exceeds the authority of the Court. *Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009); *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 136 (D.D.C. 2010). This is consistent with the scope of review under the APA, where a court may only vacate agency action that it "hold[s]" unlawful." 5 U.S.C.A. § 706(2). This is true regardless of whether the decision was part of an adjudication or a rule making, as § 706 encompasses all forms of agency action. *See id.* Although Maine cites to some Courts that have held that they have equitable authority to vacate a decision even absent such a determination, none of those cases involve a situation like what we have here with one party requesting *reformation* of a portion of the underlying decision rather than *vacatur* of the entire decision.

Further, Maine is wrong in its analysis of the harms that would be created by the requested vacatur of some but not all of EPA's determinations. Maine asserts that there would be no harm to the tribal intervenors or the Defendants because EPA's final rulemaking, which Maine calls the "Maine Rule," establishing water quality standards within Indian waters in Maine would remain in place notwithstanding the vacatur. That is nonsensical. That final rule is deeply intertwined

with the very portions of EPA's February decisions that Maine now seeks to casually vacate. Indeed, the Rule includes the following determinations of EPA:

> On April 20, 2016, EPA made a CWA section 303(c)(4)(B) determination that, for any waters in Maine where there is a sustenance fishing designated use and Maine's existing HHC are in effect, new or revised HHC for the protection of human health in Maine are necessary to meet the requirements of the CWA. EPA proposed (see 81 FR 23239, 23242-23243), and is now finalizing, HHC for toxic pollutants, in accordance with the CWA section 303(c)(4)(B) determination, for the following waters: (1) Waters in Indian lands in the event that a court determines that EPA's disapprovals of HHC for such waters were unauthorized and that Maine's existing HHC are in effect; [FN7] and (2) waters where there is a sustenance fishing designated use outside of waters in Indian lands.

81 Fed. Reg. at 92,468 (Dec. 19, 2016). Maine has forthrightly conceded that it "still intends to eventually challenge" those rules if it succeeds in vacating the underlying decisions ECF 15, PageID# 3960. However, because Maine has brought *none* of those administrative determinations before this Court, the Court lacks authority to effectively vacate those rules by vacating a portion of their underlying premise as here requested by Maine.

Because the Settlement Acts mandate that tribal sustenance uses be protected as designated uses under the Clean Water Act, neither EPA nor the Intervenors have confessed error in EPA's decision, the Court has not made a determination on the merits (or even that there is any error whatsoever in EPA's analysis), and Maine's request exceeds even the equitable jurisdiction of this Court in this action, this Court should decline Maine's invitation to exceed its authority by vacating any decisions that it remands to the agency.

CONCLUSION

For the reasons stated, this Court should deny the requested remand; if some portion of the APA claim is nonetheless remanded, this Court should remand only the record and otherwise retain jurisdiction over the matter and should not reform the EPA's February 2015 Decision by vacating a component of them.

Respectfully submitted this 28th day of September 2018.

/s David M. Kallin
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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2018 I electronically filed the foregoing Opposition of the Penobscot Nation to EPA's Motion for Voluntary Remand, together with Exhibit A (Declaration of Kaighn Smith Jr.) and Exhibits 1 and 2 attached thereto, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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